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July 13, 2017

**BY ELECTRONIC FILING**

Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

**Re: *Ex Parte* Communication in: MB Docket No. 15-216 (Good Faith Negotiation); MB Docket No. 10-71 (Retransmission Consent); MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (Local Media Ownership)**

Dear Ms. Dortch:

On July 11, 2017, representatives of the American Television Alliance met separately with Media Bureau staff and with Commissioner O'Rielly's office to discuss retransmission consent concerns in light of a broadcaster proposal to relax or eliminate the top-four prong of the local ownership rule. Present at the first meeting on behalf of the Media Bureau were Michelle Carey, Ben Arden, and Mary Beth Murphy (by telephone). Present on behalf of ATVA were Maureen O'Connell (Charter), Hadass Kogan (DISH), Stacy Fuller and Jeanine Poltronieri (AT&T), Ross Lieberman (ACA), and Michael Nilsson (Harris, Wiltshire & Grannis LLP). Present at the second meeting with Erin McGrath on behalf of Commissioner O'Rielly's office were the attendees from the first meeting, along with ATVA Executive Director Mike Chappell and Mary Lovejoy replacing Ross Lieberman for ACA.

We reiterated points made in our February 17, 2017 *ex parte* letter on this issue. In particular, we noted that:

- Three years ago, the Commission unanimously adopted an Order prohibiting joint retransmission consent negotiations among non-commonly owned top-four broadcasters.[1] The Commission discussed at length the need for such a prohibition. In doing so, it found (among many other findings) that "joint negotiation among any two or more separately owned broadcast stations serving the same DMA will invariably tend to yield

1 *See Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351 (2014) ("*2014 Joint Negotiation Order*"), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-29A1.pdf.

retransmission consent fees that are higher than those that would have resulted if the stations competed against each other in seeking fees."[2]

- Later that year, with bipartisan support, Congress ratified and strengthened this prohibition in promulgating its own, broader prohibition on joint negotiation.[3]

- Last year, the Department of Justice cited similar concerns in requiring Nexstar to divest Media General stations.[4] It stated:

> The acquisition would provide Nexstar with the ability to threaten MVPDs in each of the DMA Markets with the simultaneous blackout of at least two major broadcast networks: its own network(s) and Media General's network(s). That threatened loss of programming, and the resulting diminution of an MVPD's subscribers and profits, would significantly strengthen Nexstar's bargaining position. Prior to the merger, an MVPD's failure to reach a retransmission agreement with Nexstar for a broadcast television station might result in a blackout of that station and threaten some subscriber loss for the MVPD. But because the MVPD would still be able to offer programming on Media General's major network affiliates, which are at least partial substitutes for Nexstar's affiliates, many MVPD subscribers would simply switch stations instead of cancelling their MVPD subscriptions. After the merger, an MVPD

2 *2014 Joint Negotiation Order*, ¶ 10; *see also id.* ¶ 13 ("Because same market, Top Four stations are considered by an MVPD seeking carriage rights to be at least partial substitutes for one another, their joint negotiation prevents an MVPD from taking advantage of the competition or substitution between or among the stations to hold retransmission consent payments down. The record also demonstrates that joint negotiation enables Top Four stations to obtain higher retransmission consent fees because the threat of simultaneously losing the programming of the stations negotiating jointly gives those stations undue bargaining leverage in negotiations with MVPDs. This leverage is heightened because MVPDs may be prohibited from importing out-of-market broadcast stations carrying the same network programming as the broadcast stations at issue in the negotiations.") (internal citations omitted).

3 *See* STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 103(a); 47 U.S.C. § 325(b)(3)(C) (requiring the Commission to "prohibit a television broadcast station from coordinating negotiations or negotiating on a joint basis with another television broadcast station in the same local market . . . to grant retransmission consent under this section to a[n MVPD], unless such stations are directly or indirectly under common de jure control permitted under the regulations of the Commission. . . ").

4 *See* Competitive Impact Statement at 8-9, *United States v. Nexstar Broad. Grp.*, No. 1:16-cv-01772-JDB, 2016 WL 8458470 (D.D.C., Sept. 12, 2016) (unpublished), https://www.justice.gov/atr/case-document/file/910661/download.

> negotiating with Nexstar over a retransmission agreement could be faced with the prospect of a dual blackout of major broadcast networks (or worse), a result more likely to cause the MVPD to lose subscribers and therefore to accede to Nexstar's retransmission fee demands. For these reasons, the loss of competition between the Nexstar and Media General stations in each DMA Market would likely lead to an increase in retransmission fees in those markets and, because increased retransmission fees typically are passed on to consumers, higher MVPD subscription fees.[5]

Thus, in the last three years, the Commission has made extensive findings with respect to joint negotiation among top-four stations within a market—findings that apply equally to joint *ownership* of such stations. Congress ratified these findings. And the Department of Justice adopted similar reasoning in imposing a structural remedy on merging parties. Should the Commission seek to eliminate the top-four prong of the local ownership rule, it will have to either explain why its earlier findings are no longer valid or provide some alternative means to address the problems it previously identified.[6]

In accordance with the Commission's rules, I will file one copy of this letter electronically in each of the dockets listed above.

Respectfully submitted,

Michael Nilsson
*Counsel to the American Television Alliance*

cc: Meeting attendees

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[5] *Id.*

[6] *See, e.g.*, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. . . . Sometimes [an agency must provide a more detailed explanation]—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.") (internal citations omitted).